Supreme Court, U.S.
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No. 02-

IN THE

Supreme Court of the United States

ANCHOR HOCKING, INC.,

Petitioner,

v.

ARLEEN E. WADDILL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE OREGON COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Before *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994) ("*Oberg* (*federal*)"), the amount of a punitive damages award made by a jury was unreviewable in Oregon, under Oregon's culture of complete deference to juries' factfinding. In response to *Oberg* (*federal*), the Oregon Supreme Court adopted a "rational juror" standard of review that remained highly deferential (*Oberg v. Honda Motor Co.*, 320 Or. 544, 551, 888 P.2d 8, 12 (1995), *cert. denied*, 517 U.S. 1219 (1996) ("*Oberg* (*state*)")), and the Oregon Supreme Court has reaffirmed that standard even after *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996) and *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001). *See Parrott v. Carr Chevrolet, Inc.*, 331 Or. 537, 17 P.3d 473 (2001). Is Oregon's deferential standard (which was applied in this case) consistent with the due process mandate articulated in *BMW* and *Cooper*, which requires independent judicial examination of punitive damages awards, under three criteria, without deference to the jury?

2. Was the $1 million punitive award in this case excessive

(a) under *BMW* and *Cooper*?

(b) because the admitted measure of damages — one month of the defendant's nationwide profits from all of its products — includes extraterritorial punishment?

(c) under the Excessive Fines Clause (when the State shares in punitive awards)?

3. Should the Court defer consideration of this Petition pending the disposition of *State Farm Mut. Auto Ins. Co. v. Campbell*, No. 01-1289 (certiorari granted June 3, 2002), which raises similar issues concerning the standards for reviewing punitive damages awards and extraterritorial punishment?

PARTIES TO THE PROCEEDING AND DESIGNATION OF CORPORATE RELATIONSHIP

Petitioner Anchor Hocking, Inc. is an indirect, wholly-owned subsidiary of Newell Rubbermaid Inc. Newell Rubbermaid Inc. is publicly traded.

Respondent Arleen E. Waddill is an individual.

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Petitioner Anchor Hocking, Inc. ("Anchor Hocking") respectfully petitions for a writ of certiorari to review the judgment of the Oregon Court of Appeals in this case.

OPINIONS BELOW

The opinions of the trial court, the Circuit Court of Multnomah County, Oregon (19a-21a), have not been officially reported. The opinion of the Oregon Court of Appeals (1a-18a) is reported at 175 Or. App. 294, 27 P.3d 1092 (2001). The opinion of the Oregon Supreme Court, denying Anchor Hocking's petition for review (22a), has not been officially reported, but its action denying review is noted at 334 Or. 260, 47 P.3d 486 (2002).

STATEMENT OF JURISDICTION

The judgment of the Oregon Court of Appeals was entered on July 11, 2001. Anchor Hocking timely filed a petition for discretionary review with the Oregon Supreme Court on October 10, 2001. The Oregon Supreme Court denied the petition for review on June 4, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides: "No State shall . . . deprive any person of life, liberty, or property without due process of law." U.S. Const. amend. XIV, § 1.

The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

STATEMENT OF THE CASE

This case raises the question whether a state may constitutionally impose, without any meaningful judicial review, a million-dollar punitive damages penalty because a manufacturer failed to warn that a glass fishbowl — conceded to be flawlessly designed and manufactured — might break.

Petitioner Anchor Hocking manufactures glass products, including fishbowls. The plaintiff owned a two-gallon Anchor Hocking fishbowl, which broke while she was handling it. The broken glass cut her hand. She sued Anchor Hocking on a failure-to-warn theory, expressly dropping any claim of defect in design or manufacture.

The plaintiff's compensatory liability theory was that, no matter how well designed and manufactured, every fishbowl could, when used as intended, develop "imperceptible" cracks that were "too small to see," which could cause it to break without warning, like a "time bomb." The manufacturer should have warned, the plaintiff claimed, that fishbowls should not be used if bumped, chipped, or scratched (though she denied this happened to hers), and should be examined carefully (though the alleged problem was "imperceptible" — indeed, only an expert with special training and equipment could find it). In essence, she claimed that Anchor Hocking failed to warn her (1) to avoid doing what she said she never did, and (2) to be on the lookout for what she could not see.

The plaintiff's punitive damages theory was that Anchor Hocking failed to preserve written records of three prior complaints about broken fishbowls, which assertedly should have alerted it to the need to give the proposed warning. In response to a discovery request for documents concerning such prior claims, Anchor Hocking had initially found no responsive documents in its files, but later amended its disclosure and produced records of a ten-year-old lawsuit (*Fischer*), which referenced two earlier complaints (*Gifford* and *Bye*), which the plaintiff then obtained.

All three prior complaints involved fishbowls that allegedly broke because of isolated manufacturing defects, of a kind expressly disclaimed here. Even these allegations were never proved. The fifteen-year-old *Bye* case was dismissed by stipulation, making Anchor Hocking the prevailing party under Oregon law. Anchor Hocking won the ten-year-old *Gifford* case in Tennessee, which was dismissed on Anchor Hocking's motion and with the plaintiff's acquiescence, after years of repeated continuances and failures to proceed by the plaintiff. Anchor Hocking settled the *Fischer* case, without admitting liability, in the face of numerous disputed issues, ranging from whether Anchor Hocking manufactured the bowl (Fischer threw the broken bowl away) to how the bowl broke (because it had been discarded, it was never tested, but contemporaneous hospital records state that Fischer "dropped [the] fishbowl").

At trial, the plaintiff offered the complaints and answers in the *Fischer*, *Gifford*, and *Bye* cases on the liability issue, arguing that these old claims of defective manufacture should have made Anchor Hocking aware of a need to warn the plaintiff about a different alleged danger posed by properly manufactured bowls. The trial court admitted this evidence,

over Anchor Hocking's objection, for "notice," but (again over objection) the plaintiff instead suggested their supposed merit throughout trial.

The plaintiff also used the prior complaints as the basis for her punitive damages claim. She argued that, because Anchor Hocking's engineering manager had a practice of preserving records of product complaints only for five years, Anchor Hocking deliberately and "consciously blinded itself" to a "known serious risk" by "destroy[ing] the records that demonstrated" past misdeeds. The supposed "known" merit of the prior lawsuits, coupled with Anchor Hocking's supposed "conscious destruction" of their records, were claimed to be so egregious as to call for punitive damages.

The jury, voting 9-3, returned a general verdict for the plaintiff in July 1995. The jury assessed compensatory damages of $134,472, and punitive damages of $1 million.[1] The jury also found the plaintiff 25% at fault. The trial court entered judgment, reducing the compensatory, but not the punitive, award by 25%.

After unsuccessfully seeking post-trial relief (19a-21a), Anchor Hocking appealed, raising a number of state-law challenges regarding liability and punitive damages, as well as several federal constitutional challenges (including whether the punitive damages award was excessive under the Due Process and Excessive Fines Clauses and whether it improperly included extraterritorial punishment). In the Oregon Court of Appeals, Anchor Hocking invoked the punitive damages analysis required by this Court's then-recently-issued decision in *BMW*.

1. Today, the punitive damages award, including interest since the award was rendered in 1995, is in excess of $1.6 million.

The Oregon Court of Appeals initially reversed and ordered a new trial, without reaching the punitive damages issues. *Waddill v. Anchor Hocking, Inc.*, 149 Or. App. 464, 479, 944 P.2d 957, 966 (1997). The Oregon Supreme Court reversed the new trial order, and subsequently (on Anchor Hocking's motion for reconsideration) remanded for consideration of the remaining issues, including those concerning punitive damages. *Waddill v. Anchor Hocking, Inc.*, 330 Or. 376, 8 P.3d 200 (2000); *Waddill v. Anchor Hocking, Inc.*, 331 Or. 595, 595, 18 P.3d 1096, 1097 (2001).

After the Oregon Supreme Court granted Anchor Hocking's petition for reconsideration, but before the Court of Appeals issued its opinion on remand, this Court decided *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001). Anchor Hocking sought leave to file a supplemental brief on remand to address *Cooper*, *inter alia*, but the Oregon Court of Appeals refused. *Waddill v. Anchor Hocking, Inc.*, 175 Or. App. 294, 302 n.5, 27 P.3d 1092, 1097 n.5 (2001) (11a).

On remand, the Oregon Court of Appeals affirmed the verdict in its entirety without reaching many of Anchor Hocking's federal constitutional challenges. Anchor Hocking's challenges to the million-dollar punitive award included an Excessive Fines Clause analysis and an analysis under the three guideposts of *BMW*, 517 U.S. at 574-75.[2] On the first *BMW* guidepost (reprehensibility), Anchor Hocking pointed to the absence of any evidence that it "consciously ignored" that its fishbowls had the problem

2. As the Oregon Court of Appeals noted, Anchor Hocking had preserved these challenges to the amount of the punitive award in its post-trial motion, as required by Oregon law. *Waddill*, 175 Or. App. at 305 n.7, 27 P.3d at 1098 n.7 (15a).

complained of (for the three prior complaints concerned a different alleged problem, and in any event were mere unproved complaints), and the absence of any evidence that it "concealed" records of its "guilt." On the second *BMW* guidepost (proportionality), Anchor Hocking argued that the 10:1 ratio of punitives:compensatories was excessive, especially in light of the substantial compensatory award and the low (if any) reprehensibility of its conduct. On the third *BMW* guidepost (comparable penalties), Anchor Hocking argued that no civil or criminal penalty came close to $1 million, and it was never on notice that its conduct could subject it to such an award. In addition, Anchor Hocking argued that the punitive award — calculated as one month's profits for the entire company (of which fishbowl manufacture was a tiny part), and based on its conduct throughout the United States (including specifically Tennessee, where it *won* the *Gifford* case) — improperly imposed extraterritorial punishment.

The Court of Appeals ignored *Cooper*'s statement that the amount of punitive damages awarded by the jury was not a "fact" entitled to any deference. It did not address Anchor Hocking's Excessive Fines argument, failed to address extraterritoriality, and failed even to consider *BMW*'s comparative-fines guidepost. *Waddill*, 175 Or. at 301-07, 27 P.3d at 1096-99 (9a-17a). The Oregon Supreme Court denied review. 334 Or. 260, 47 P.3d 486 (2002) (22a).

REASONS FOR GRANTING THE WRIT

The Oregon courts have defied this Court's repeated, express directives that due process requires independent judicial scrutiny of punitive damages awards for excessiveness. The Oregon Supreme Court's decisions in

Oberg (*state*), 320 Or. at 551, 888 P.2d at 12, and *Parrott*, 331 Or. at 554-55, 17 P.3d at 484, which forbid independent judicial scrutiny, conflict with this Court's decisions in *BMW*, 517 U.S. at 574-75, and *Cooper*, 532 U.S. at 436, 440-43, which mandate it. The Oregon Court of Appeals followed *Oberg* (*state*) and *Parrott*, rather than *BMW* and *Cooper*, and the Oregon Supreme Court denied review.

Oregon has a longstanding jurisprudential culture of complete deference to juries' factfinding. That culture, embraced in Oregon as a matter of state constitutional principle, came before this Court in *Oberg* (*federal*), 512 U.S. at 427-29, when the Court held that federal due process took precedence over any application of this state constitutional principle insulating juries' punitive assessments from judicial review (*id.* at 430-34). The Court required that Oregon courts (which had refused to review the amount of juries' punitive awards at all) provide such review, but it did not then particularize the standard of review. *Id.* at 432 & n.10. In response, the Oregon Supreme Court adopted a standard of review, which it called the "rational juror" standard, that provides review in form but not in substance, for such review continues to require complete deference to the jury unless the verdict was completely irrational. *Oberg* (*state*), 320 Or. at 551, 888 P.2d at 12.

The Oregon courts have continued to insist on this deference even after this Court particularized the due-process-required standard of review in *BMW* and *Cooper*. In those cases, the Court made clear that punitive damage determinations are not "facts" to which a state may demand complete deference, but instead are determinations

that require judicial judgments (e.g., cross-case comparisons to ensure consistency and compatibility with comparable civil or criminal penalties).

In response to *BMW*, the lower Oregon courts began to provide such review.[3] But the Oregon Supreme Court put an end to that practice, holding in *Parrott* that the Oregon Constitution and the "rational juror" standard continue to demand total deference to juries, so long as the jury was not irrational:

> [W]e conclude that the guideposts announced in *BMW* are *additional factors* for the reviewing court in Oregon to consider as part of the *Oberg* (*state*) rational juror review. . . . [T]he rational juror inquiry survives as the standard for post-verdict judicial review of an award of punitive damages in Oregon under the Fourteenth Amendment.

331 Or. at 554-55, 17 P.3d at 484 (emphasis added).

In *Cooper*, which was issued a few months after *Parrott*, this Court stated that "the question of the substantive standard for determining the jury award's conformity with due process in the first instance . . . [was] answered in *BMW of North America, Inc. v. Gore*." *Cooper*, 532 U.S. at 431 n.4 (internal

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3. *See, e.g.*, *Blume v. Fred Meyer, Inc.*, 155 Or. App. 102, 113, 963 P.2d 700, 706 (1998) (after *BMW*, the *Oberg* (*state*) rational juror standard was no longer applicable); *Parrott v. Carr Chevrolet*, 156 Or. App. 257, 274-75, 282, 965 P.2d 440, 451, 455 (1998) (following *Blume*, Court of Appeals ordered remittitur of $1 million punitive award to $300,000), *rev'd in relevant part*, 331 Or. 537, 565, 17 P.3d 473, 490 (2001).

citations omitted). It further held that "[u]nlike the measure of actual damages suffered, which represents a question of historical or predictive fact, the level of punitive damages is not really a 'fact' 'tried' by the jury." *Id.* at 437 (internal quotations and citations omitted). Nonetheless, the Oregon Court of Appeals treated the $1 million punitive damages award in this case as a fact found by the jury and applied the kind of total deference to the jury's verdict mandated by *Oberg* (*state*) and *Parrott*.[4]

What the Oregon courts characterize as deference is in reality judicial abdication of a profound constitutional duty. This is not the first time the Oregon courts have defied this Court's plain statements concerning punitive damages. In *Oberg* (*federal*), the Court noted that the Oregon Supreme Court had "reject[ed] the idea that judicial review of the size of punitive damages awards was required by [*Pacific Mut. Life Ins. Co. v. Haslip*, 449 U.S. 1 (1991)]," even though "[o]ur recent cases have recognized that the Constitution imposes a substantive limit on the size of punitive damages awards" (512 U.S. at 428, *citing Haslip* and *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993)). In *Parrott*, the Oregon Supreme Court reiterated that "[t]here is . . . no 'state law excessiveness challenge' under the Oregon Constitution" and stated that it had articulated a standard for reviewing punitive damages under the "*federal constitution*" only because this Court had required it. *Parrott*, 331 Or. at 551, 553, 17 P.3d at 482, 483 (emphasis in original).

Parrott and *Cooper* have collided in this case. The "rational juror" standard is simply incompatible with the requirements of the federal Due Process Clause, as

4. *Parrott* was settled before the filing of a petition for a writ of certiorari.

articulated by this Court. The Court of Appeals refused to take additional briefs in light of *Cooper* and plainly misapprehended the significance of the decision, characterizing it as relating only to procedure and not to substantive due process. *Waddill*, 175 Or. App. at 302 n.5, 27 P.3d at 1097 n.5 (11a). As a result, the court, relying only on *Parrott*, improperly deferred to the jury and failed to apply independent, de novo judicial scrutiny.[5]

This Court has signaled the constitutional significance of *Cooper*, promptly vacating three state-court decisions for reconsideration in light of *Cooper*. *See San Paolo U.S. Holding Co. v. Simon*, 532 U.S. 1050, 1050 (2001) (vacating unpublished opinion from the California Second Appellate District, and remanding for further consideration in light of *Cooper*); *Time Warner Entertainment Co. v. Six Flags Over Georgia*, 122 S. Ct. 24, 25 (2001) (vacating 245 Ga. App. 334, 537 S.E.2d 397, and remanding for further consideration in light of *Cooper*); *National Union Fire Ins. Co. v. Textron Financial Corp.*, 122 S. Ct. 340, 340 (2001) (vacating unpublished opinion from the California Fourth Appellate District, and remanding for further consideration in light of *Cooper*).[6]

The "rational juror" standard, coupled with Oregon's long-standing hostility to subjecting the size of jury verdicts

5. Indeed, the court did not faithfully apply *Parrott* itself, for the punitive damages award is plainly excessive even under the "rational juror" standard.

6. *See also* 69 U.S.L.W. 3675, 70 U.S.L.W. 3031, and 70 U.S.L.W. 3156, listing the questions presented in the certiorari petitions in *San Paolo*, *Time Warner*, and *National Union*, respectively.

to any scrutiny, amounts in practice to no review at all. *Oberg* (*federal*), *BMW*, and *Cooper* have had a profound impact on the judicial review of punitive damages throughout the United States — but not in Oregon. Some of the lower Oregon courts have shown willingness to review punitive damages awards under *BMW*, but they have been forbidden by the Oregon Supreme Court. Only this Court has the power to correct this situation and restore meaningful punitive damages review in Oregon.

It is clear for multiple reasons that the amount of punitive damages awarded in this case cannot survive meaningful judicial scrutiny. First, under *BMW* and *Cooper*, Anchor Hocking's conduct was not reprehensible. At best, the evidence showed that Anchor Hocking was negligent in multiple, independent ways. The ratio of punitive damages to compensatory damages is nearly 10:1, suspiciously excessive since the case involves a cut hand for which the plaintiff received significant compensatory damages and reprehensibility is absent. Finally, the comparable civil or criminal penalties for Anchor Hocking's conduct were orders of magnitude less than the $1 million award. Anchor Hocking had no notice that negligent failure to warn and failure to keep records would subject it to so large an award.

Second, the award unquestionably includes extraterritorial punishment, contrary to *BMW*. The plaintiff relied on the *Gifford* case from Tennessee in arguing for punitive damages, even though Anchor Hocking won that case. Moreover, the plaintiff's benchmark for punitive damages was one month of Anchor Hocking's nationwide profits from all products, not just fishbowls like that at issue in this case.

Third, the $1 million award cannot survive scrutiny under the Excessive Fines Clause. The Oregon Supreme Court recently confirmed that Oregon's split-share statute, under which the State of Oregon receives a significant percentage of any punitive damages award, does not violate the Oregon Constitution. *See DeMendoza v. Huffman*, 334 Or. 425, 2002 WL 1827841, at *17 (Or. Aug. 8, 2002). Accordingly, if the punitive damages award is upheld, Anchor Hocking will be required to pay the State one-half of the award after deducting the plaintiff's attorneys' fees.[7] The resulting public fine — hundreds of thousands of dollars — is completely out of proportion to the gravity of Anchor Hocking's alleged offense (negligently failing to keep records of prior lawsuits alleging defectively manufactured bowls, which assertedly would have led Anchor Hocking to warn about perfectly manufactured bowls). *See United States v. Bajakajian*, 524 U.S. 321, 334 (1998) (a fine is constitutionally excessive "if it is grossly disproportional to the gravity of a defendant's offense").

The standards for reviewing punitive damages awards and the propriety of extraterritorial punishment are currently before the Court in *State Farm Mut. Auto Ins. Co. v. Campbell*, No. 01-1289 (certiorari granted June 3, 2002). The Court's decision in *Campbell* will likely have a further profound impact on judicial review of the amount of punitive damages. Accordingly, Anchor Hocking respectfully requests that the Court, at a minimum, defer consideration of this Petition pending the disposition of *Campbell*.

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7. Under the version of Oregon Revised Statutes 18.540 applicable to this case, the State receives one-half of the remainder of any punitive damages award after a deduction for attorneys' fees. The version of ORS 18.540 at issue in *DeMendoza* provided for a 60% flat allocation to the State. 2002 WL 1827841, at *2.

I. Review is Warranted to Determine Whether Oregon's Standard for Reviewing Punitive Damages Awards is Consistent with this Court's Decisions.

The Court should grant review to determine whether the "rational juror" standard of *Oberg* and *Parrott* can survive *BMW* and *Cooper* (and to hold that it cannot). As a matter of federal constitutional law, the amount of punitive damages that the jury awarded was not a "fact" entitled to any deference. *Cooper*, 532 U.S. at 437. The Due Process Clause requires a reviewing court independently to examine punitive damages awards under the three-factor *BMW* test, without giving deference to the jury. *Id.* at 440. In affirming the punitive award, the Court of Appeals applied a deferential "rational juror" standard based on *Oberg* and *Parrott*, and failed to conduct de novo review, required by *Cooper* under the standards articulated by *BMW*.

The "rational juror" standard is starkly incompatible with all of the *BMW* guideposts and the de novo review mandated by *Cooper*. "Independent examination or review means a searching review, one that hunts for error and gives virtually no weight to the decisional process under review." *Rhone-Poulenc Agro, S.A. v. DeKalb Genetics Corp.*, 272 F.3d 1335, 1347 (Fed. Cir. 2001), *cert. pending*, No. 02-130.

With respect to the first *BMW* guidepost (reprehensibility), the jury is instructed to consider "the character of the defendant's conduct," but it is given no guidance as to what that means. "Reprehensibility depends on the nature of the conduct itself and the context in which it occurred. Reprehensibility does not ask whether [a defendant's] conduct warrants punishment. . . . Instead, the first *BMW* factor is concerned with where [a defendant's]

conduct fits on a scale of outrageousness." *Watson v. Johnson Mobile Homes*, 284 F.3d 568, 572 (5th Cir. 2002). Along this scale, "[c]onduct involving violence or threats of violence is obviously more shocking than that which causes only economic harm. Similarly, trickery and deceit are more deserving of sanction than mere negligence." *Id.* (internal citations omitted), *citing BMW*, 517 U.S. at 575-76. Ascertaining a reprehensibility spectrum that is coherent, rational, and consistent across cases is a function that only courts can carry out effectively.

Indeed, while reviewing courts must defer to juries' determination of underlying facts unless clearly erroneous, "determining the 'degree of reprehensibility' ultimately involves a legal conclusion." *Leatherman Tool Group, Inc. v. Cooper Indus., Inc.*, 285 F.3d 1146, 1150 (9th Cir. 2002). As three members of this Court observed in *BMW*, jurors cannot be expected "to interpret law like judges, who work within a discipline and hierarchical organization that normally promotes roughly uniform interpretation and application of the law." 517 U.S. at 596 (Breyer, J., concurring, joined by O'Connor and Souter, JJ.).

The second due process guidepost (the disparity between the punitive damages award and the actual or potential harm inflicted) includes a factual component — the jury's assessment of the plaintiff's actual damages — but it, too, involves a predominantly legal inquiry. The question asked by the court is not simply "what is the ratio?" Rather, it is whether the disparity between the punitive damages and the compensatory award (or the plaintiff's potential harm) is so dramatic as to be outside the "constitutionally [or legally] acceptable range." The only nonarbitrary way to determine whether a particular ratio is excessive for the particular set

of variables present in a given case is to consider ratios that have been permitted in other cases. Juries cannot and do not perform that inherently legal function. Only judges can.

The third *BMW* guidepost requires the reviewing court to consider whether the jury's award is "substantially greater" than statutory penalties for comparable conduct. 517 U.S. at 584. For this component of due process analysis, the court must undertake traditional legal research, seeking to identify potentially applicable statutes and penalties. Then it must once again make a judgment whether the disparity between those penalties and the jury award is so substantial as to indicate that the verdict is profoundly out of line with legislative judgments[8] about the appropriate punishment for such conduct, denying the defendant fair notice that it was risking sanctions of the magnitude issued by the jury. As this Court noted in *Cooper*, the comparison with statutory penalties is "more suited" to appellate review because it calls for "a broad legal comparison." 532 U.S. at 440.

In short, the constitutional challenges to punitive damages awards for excessiveness must undergo independent, de novo judicial review, without deference to what a "rational juror" may have done, if the Due Process Clause is to function effectively as a bulwark against wholly arbitrary or irrational awards. Indeed, the only refuge from

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8. Notably, the Oregon Supreme Court's "rational juror" standard accords deference to the wrong deliberative body. Explaining the rationale behind the third guidepost, this Court in *BMW* stated that courts must "accord 'substantial deference' to *legislative* judgments concerning appropriate sanctions for the conduct at issue." 571 U.S. at 583 (citation and quotation omitted; emphasis added). By contrast, the rational juror standard requires substantial deference to the opinion of the jury.

such verdicts is the imposition of "significant[] constrain[ts]" on the determination whether the jury's award has transcended constitutional bounds. *BMW*, 517 U.S. at 595 (Breyer, J., concurring). Under a deferential "rational juror" standard, the guideposts adopted in *BMW* that "purport to channel discretion" will "not do so in fact." *Id.* Rather, the deference will invite, if not encourage, judicial nullification of these supposedly constraining forces. In the end, the highly deferential "rational juror" standard is virtually identical to the "rational basis scrutiny" proposed by the respondents and rejected by this Court in *TXO*, 509 U.S. at 455-56.

In *Cooper*, the Court made clear that "the question of the substantive standard for determining the jury award's conformity with due process in the first instance" was no longer an open issue, for the question "has already been answered by [*BMW*]." 532 U.S. at 431 n.4. *Cooper* went further, however, holding that this substantive standard must be weighed and applied by the court de novo. *Id.* at 435-40. The Court signaled the importance of *Cooper* when it granted certiorari, vacated, and remanded three state-court cases for reconsideration in light of that decision. *See San Paolo*, 532 U.S. at 1050; *Time Warner*, 122 S. Ct. at 25; *National Union Fire Ins.*, 122 S. Ct. at 340. The petition for writ of certiorari in each case contended that the lower court applied a deferential standard of review.[9]

The Court's attention to whether states are faithfully following *Cooper* underscores why review is appropriate here: the lower courts of Oregon cannot follow both *Cooper*

9. *See also* 69 U.S.L.W. 3675, 70 U.S.L.W. 3031, and 70 U.S.L.W. 3156, listing the questions presented in the certiorari petitions in *San Paolo*, *Time Warner*, and *National Union*, respectively.

and the Oregon Supreme Court's decisions. The Oregon Supreme Court has declined either to provide guidance or to implement federal constitutional requirements. Particularly in light of the Oregon courts' repeated defiance of this Court's directives concerning review of punitive damages awards, review is warranted. *See* Rule 10(c).

II. The Court Should Review the Punitive Damages Award for Excessiveness.

A. The Award is Excessive under *BMW* and *Cooper*.

The Oregon Court of Appeals plainly misapplied *BMW* and *Cooper*. In *BMW*, 517 U.S. at 574-75, this Court held that due process requires a court to consider the degree of reprehensibility of the conduct, the disparity between the harm and the punitive award, and the difference between the punitive award and comparable civil or criminal penalties.[10] In *Cooper*, 532 U.S. at 435-40, the Court held that due process requires a reviewing court to consider these criteria independently of the jury, "de novo." As Anchor Hocking explained in its briefs to the Oregon Court of Appeals, the plaintiff demonstrated neither that Anchor Hocking's conduct was reprehensible, nor that the award was proportional to the harm she suffered, nor that the award was proportional to penalties authorized for comparable conduct. The Oregon Court of Appeals not only erred in applying the *BMW* criteria, but failed to analyze these criteria de novo in accordance with *Cooper*.

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10. The Court of Appeals held that Anchor Hocking "followed the appropriate post-trial procedures for raising [the excessiveness] issue." *Waddill*, 175 Or. App. at 305 n.7, 27 P.3d at 1098 n.7 (15a).

1. Reprehensibility.

The Oregon Court of Appeals improperly held that Anchor Hocking's conduct was reprehensible. The court based its conclusion of reprehensibility solely on the ground that Anchor Hocking assertedly "consciously ignore[d] indications that its product was unsafe." *Waddill*, 175 Or. App. at 306, 27 P.3d at 1099 (17a). As discussed above, however, there was no evidence that Anchor Hocking consciously ignored anything. It contested the prior lawsuits, winning one and securing settlement or dismissal of the others. Even were the Court to conclude that those lawsuits (admitted only for "notice") actually proved a prior problem with Anchor Hocking's fishbowls, the prior problem (manufacturing defect) was one the present plaintiff expressly disclaimed. Nowhere in the Oregon Court of Appeals' opinion is there an explanation of how a complaint alleging that an isolated fishbowl was defectively manufactured can provide notice to a defendant that its perfectly manufactured products contain a different defect about which it must warn. This would be like saying that a drug manufacturer, knowing that on some past occasions its pills were contaminated and made people sick, should know to warn that the uncontaminated drug itself makes people sick.

2. Proportionality.

The Oregon Court of Appeals also failed properly to analyze the award under the second *BMW* factor. Rather than compare the punitive and compensatory awards to determine "the disparity between the harm (or potential harm) suffered by the plaintiff and the punitive damages award" (*Cooper*, 532 U.S. at 440), the Oregon Court of Appeals simply stated that it could not conclude that a 10:1 ratio was "excessively

disproportionate" given that "broken glass is dangerous." *Waddill*, 175 Or. App. at 306, 27 P.3d at 1099 (16a). Indeed, the court ignored this Court's guidance that a 4:1 ratio "might be close to the line" (*BMW*, 517 U.S. at 581 (internal quotation omitted)), though "*low* awards of compensatory damages may properly support a higher ratio than *high* compensatory awards" (*id.* at 582 (emphasis added)). While the Oregon courts eschew any comparison of comparable awards, the punitive award both here and in *Parrott* was $1 million. The compensatory award in *Parrott*, however, was small — less than $12,000 — and the defendant's conduct was "more reprehensible" than Anchor Hocking's conduct here, factors that could support a higher ratio. *Waddill*, 175 Or. App. at 306 n.8, 27 P.3d at 1099 n.8 (17a). In contrast, the Oregon Court of Appeals admitted that the present plaintiff's compensatory damages — more than $100,000 even after reduction for her 25% fault — were "substantial." *Id.* at 306, 27 P.3d at 1099 (16a).

3. Comparable Penalties.

Finally, the Oregon Court of Appeals failed even to apply the third *BMW* factor. Rather than comparing "the difference between the punitive damages awarded by the jury and the civil penalties *authorized or imposed in comparable cases*" (*Cooper*, 432 U.S. at 440 (emphasis added)), the court asked whether Anchor Hocking had previously been punished for failing to warn of a defect in perfectly manufactured fishbowls — concluding that the absence of any prior punishment (*Waddill*, 175 Or. App. at 306, 27 P.3d at 1099 (16a)) made a large punitive award acceptable. That was the wrong question, showing a stark misunderstanding of the purpose of the third *BMW* factor.

As this Court explained in *BMW*, penalties for comparable misconduct are relevant to whether a defendant was on notice of "the severity of the penalty" that might be imposed. *BMW*, 517 U.S. at 574. The Oregon Court of Appeals engaged in no such comparison. Its entire discussion of notice was that "ORS 30.925 puts manufacturers on notice that *such* punishment is a possibility" (*Waddill*, 175 Or. App. at 306, 27 P.3d at 1099 (16a) (emphasis added)), without elaborating what "such" means.[11] Indeed, the court nowhere explained how ORS 30.925 provided any notice to Anchor Hocking that its failure to possess complete records of 10- to 15-year-old complaints alleging a different defect, none of which was ever resolved against it, could subject it to a $1 million punitive award.[12]

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11. Indeed, the plaintiff's punitive plea centered on Anchor Hocking's supposed fault in keeping records of cases filed and resolved years before this lawsuit was filed or even contemplated. Nothing in Oregon law required Anchor Hocking to keep records of past, closed litigation. The closest Oregon law comes is forbidding the destruction of evidence with the intent of making it unavailable in a pending or imminent lawsuit (which did not happen here), a Class A misdemeanor. ORS 162.295. The penalty for a Class A misdemeanor by a corporation may not exceed $5,000. ORS 161.655(1)(b). Even if Anchor Hocking had discarded documents during the pendency of this case, rather than years before it arose, its maximum penalty would have been only 1/200th the $1,000,000 punitive award actually imposed here.

12. Nor did Anchor Hocking have any notice that it might incur such a penalty. In contrast to *Parrott*, where the Court held there was sufficient notice of a potential $1 million punitive award because, *inter alia*, "a regulatory scheme of sanctions that includes interruption or closure of business operations provides sufficient notice to a business defendant that its violation of the law could have serious economic consequences" (331 Or. at 564, 17 P.3d at 489), Anchor

(Cont'd)

4. "De Novo" Review.

To the extent the Court of Appeals considered the three *BMW* criteria at all, it did so with heavy deference to the jury's conclusions. *Cooper* forbids that approach, requiring that the court independently ("de novo") analyze the criteria, because as a matter of federal constitutional law they are matters of judicial, and not jury, competence. *Cooper*, 532 U.S. 437-40.

In adopting a standard of review that defers to the jury, the Oregon Supreme Court has never addressed the significance of the purpose of that review. The purpose is one of constitutional dimension, for the reviewing court's responsibility is to determine whether the standards of federal due process have been satisfied. This Court has held that "'the question whether a fine is constitutionally excessive calls for the application of a constitutional standard to the facts of a particular case,'" *Cooper*, 532 U.S. at 435, *quoting Bajakajian*, 524 U.S. at 336-37 n.10, and in *Cooper* itself the Court concluded that whether a punitive damages award is constitutionally excessive calls for the application of a similar standard: "courts of appeals should apply a de novo standard of review when passing on district courts' determinations of the constitutionality of punitive damages awards," *Cooper*, 532 U.S. at 436.

When a court reviews an award of punitive damages, it is not reviewing a jury's findings with respect to disputed

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(Cont'd)
Hocking had no notice that it might be subject to a $1 million punitive award for failing to possess complete records of old, unproved, closed complaints that concerned alleged manufacturing defects (concededly absent here).

historical events. (Was the light green? Who pulled the trigger? Was there a mouse in the soup?) "Unlike . . . question[s] of historical or predictive fact, . . . the level of punitive damages is not really a 'fact' tried by the jury." *Id.* at 437 (internal citations and quotations omitted). Punitive damages "operate as 'private fines' intended to punish the defendant and deter future wrongdoing." *Id.* at 432. Independent review, *without deference to the conclusions of the jurors*, is necessary as a prophylactic measure to guard against the danger of unconstitutional deprivations. This issue is nowhere addressed in *Parrott* or in the Oregon Court of Appeals' opinion below.

Anchor Hocking has not received the de novo review the federal Constitution requires. The Court should grant review to provide it.

B. The Award Includes Extraterritorial Punishment.

The Court should also grant review because the punitive damages award includes unconstitutional extraterritorial punishment. In *BMW*, this Court held that extraterritorial punishment violates the Due Process Clause, and required courts to consider whether punitive awards punish out-of-state conduct that was not illegal where it occurred. 517 U.S. at 571-73. The punitive award was improper because it was based, in substantial part, on Anchor Hocking's out-of-state conduct: a case in Tennessee that it won; hypothetical complaints throughout the country for which the plaintiff sought to punish Anchor Hocking precisely because she had no evidence that they even existed; Anchor Hocking's nationwide profits from the sale of products other than

fishbowls;[13] conduct in states where punitive damages are not allowed at all, *see BMW*, 517 U.S. at 613-14 & n.6 (Ginsburg, J., dissenting) (collecting authorities).

C. The Award is Excessive under the Excessive Fines Clause.

The Court also should grant review because the punitive damages award is excessive under the Excessive Fines Clause. The Excessive Fines Clause may apply when the government shares in a punitive damages award. *Browning-Ferris v. Kelco Disposal, Inc.*, 492 U.S. 257, 275-76 (1989); *id.* at 298-99 (O'Connor, J., concurring in part and dissenting in part) (clause would apply when the government either prosecutes an action or has a right to share in the proceeds); *Austin v. United States*, 509 U.S. 602, 607 (1993). Some federal courts have applied the Excessive Fines Clause when the state shares in a punitive award. *See, e.g., United States v. Advance Tool Co.*, 902 F. Supp. 1011, 1018-19 (W.D. Mo. 1995), *aff'd mem.*, 86 F.3d 1159 (8th Cir 1996), *cert. denied*, 520 U.S. 1120 (1997); *United States ex rel. Smith v. Gilbert Realty Co.*, 840 F. Supp. 71, 74-75 (E.D. Mich. 1993); *McBride v. General Motors Corp.*, 737 F. Supp. 1563, 1578 (M.D. Ga. 1990). *Contra, Tenold v. Weyerhaeuser Co.*, 127 Or. App. 511, 528-29, 873 P.2d 413, 423-24 (1994), *rev. dismissed*, 321 Or. 561, 901 P.2d 859 (1995); *Axen v. American Home Prods. Corp.*, 160 Or. App. 19, 23, 981 P.2d 340, 342, *rev. denied*, 329 Or. 357, 994 P.2d 124 (1999), *cert. denied*, 528 U.S. 1136 (2000).

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13. As the Court held in *Cooper*, it was improper to base a company's punishment on its entire sales volume, when not all of those sales were attributable to the wrongdoing. 543 U.S. at 442.

Whether the Excessive Fines Clause applies to punitive damages awards when the state expressly shares in the award is an issue of constitutional dimension that this Court has never considered. *See, e.g., Hoskins v. Business Men's Assur.*, 79 S.W.3d 901 (Mo. 2002) (recognizing that the issue remains open). The Oregon Court of Appeals did not consider the issue in this case, but its prior decisions in *Tenold* and *Axen* are in conflict with the decisions of federal courts that have, warranting review. *See* Rule 10(b).

A fine is constitutionally excessive "if it is grossly disproportional to the gravity of a defendant's offense." *Bajakajian*, 524 U.S. at 334. Under the Excessive Fines Clause, the $1 million punitive award is patently excessive. The Oregon Court of Appeals did not address Anchor Hocking's excessive fines argument.

III. Alternatively, the Court Should Hold the Petition Pending Disposition of *State Farm v. Campbell.*

The Court granted review in *State Farm Mut. Auto Ins. Co. v. Campbell*, No. 01-1289, on June 3, 2002 (the day before the Oregon Supreme Court denied review in this case). The issues presented in *Campbell* include questions concerning the standards for reviewing punitive damages awards and the constitutionality of punitive damages based on extraterritorial conduct. Because of the significant overlap between the issues presented in *Campbell* and those presented here, and the likelihood that the Court's decision in *Campbell* will be instructive, it would serve judicial economy to hold the present Petition pending resolution of *Campbell*.

CONCLUSION

The Petition for a Writ of Certiorari should be granted, or held pending the Court's disposition of *State Farm Mut. Auto Ins. Co. v. Campbell*, No. 01-1289.

Dated: September 3, 2002

Respectfully submitted,

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APPENDIX

APPENDIX A — DECISION OF THE OREGON COURT OF APPEALS DATED JULY 11, 2001

COURT OF APPEALS OF OREGON

9405-03390; A91012

July 11, 2001.

Arleen E. WADDILL,

Respondent,

v.

ANCHOR HOCKING, INC., a Delaware corporation,

Appellant.

Before EDMONDS, Presiding Judge, and DEITS, Chief Judge,* and ARMSTRONG, Judge.

EDMONDS, P.J.

This case concerns whether a manufacturer of fishbowls is liable to a consumer because of the failure of the manufacturer to warn that its fishbowls are subject to shattering after they acquire small cracks or dings during ordinary use. Plaintiff brought this action to recover for injuries that she suffered when a fishbowl that defendant manufactured shattered while she was carrying it. We originally reversed the judgment in favor of plaintiff and remanded the case for a new trial.

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* Deits, C.J., *vice* Warren, P.J., retired.

Appendix A

Waddill v. Anchor Hocking, Inc., 149 Or.App. 464, 944 P.2d 957 (1997). On review, the Supreme Court reversed our decision and remanded the case to us to decide several issues that we had not needed to consider in our first decision. *Waddill v. Anchor Hocking, Inc.*, 330 Or. 376, 8 P.3d 200 (2000), *on recons.* 331 Or. 595, 18 P.3d 1096 (2001). We now affirm the judgment.

According to plaintiff, the fishbowl that defendant manufactured shattered with no warning, and without touching or bumping into anything, after she had used it for several months. The jury could have found, based on the testimony of plaintiff's experts, that the fishbowl had developed a small crack or ding during normal use and that the stresses from being carried while filled with water suddenly caused the crack to grow catastrophically. Pieces from the shattering fishbowl severely and permanently injured plaintiff's arms and wrists. In her complaint, plaintiff alleged that defendant's failure to warn of the necessity of inspecting the fishbowl for small cracks or dings constituted negligence and made the fishbowl dangerously defective. She sought compensatory and punitive damages as a result of her injuries. The jury determined that plaintiff's actual damages totaled $134,472; it apportioned 75 percent of the fault for her injuries to defendant and 25 percent to plaintiff. The jury also awarded plaintiff punitive damages of $1,000,000. After reducing the compensatory damages to reflect the jury's determination of fault, the court entered judgment in plaintiff's favor for $1,100,854.

In our previous decision, we held that (1) the court did not err in admitting evidence of three previous cases in which

the plaintiffs had alleged that defendant's fishbowls had shattered in ways similar to what plaintiff alleged happened in this case; (2) plaintiff had properly stated claims for strict liability and negligence for defendant's failure to warn; but (3) plaintiff's additional allegation that defendant failed to keep proper records of the previous claims was not an independent basis for a claim. Because we could not tell whether the jury had based its verdict on the improper claim, we reversed and remanded for a new trial. *Waddill*, 149 Or.App. at 478-79, 944 P.2d 957. On review, the Supreme Court held that defendant had waived the defense of failure to state a claim by not raising it in a timely fashion. It originally reversed our decision and affirmed the trial court. *Waddill*, 330 Or. at 383-84, 8 P.3d 200. On reconsideration, the court modified its disposition and remanded the case to us to consider those assignments of error that we had not previously considered. *Waddill*, 331 Or. at 595, 18 P.3d 1096.[1]

In its petition for reconsideration to the Supreme Court, defendant described the issues that we had not decided as (1) whether the probative value of the evidence of the previous complaints was outweighed by the risk of undue prejudice; (2) whether a jury instruction on the failure to warn of a known risk correctly stated Oregon law; and (3) whether any award of punitive damages was proper and, if so, whether the amount awarded was excessive. We discuss those issues in that order.

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1. Because of the scope of the remand, we do not reexamine those previous rulings that the Supreme Court's decision did not affect.

Appendix A

To support its argument that the unfair prejudicial effect of the evidence of the previous complaints substantially outweighed their probative value, defendant relies primarily on the use that plaintiff allegedly made of the evidence after the trial court decided to admit it. According to defendant, the court admitted the evidence as relevant to demonstrate that defendant had notice of a problem with its fishbowls shattering before it manufactured plaintiff's fishbowl. However, defendant argues that plaintiff went beyond that ground for admission of the evidence and used the evidence for the substantive purpose of proving that the fishbowls in the previous cases broke for the same reason that the fishbowl broke in this case. The difficulty with defendant's argument is that it has nothing to do with whether the court's original decision to admit the evidence was correct. In making that decision, the court had to weigh the probative value of the evidence against its unfair prejudicial effect at the time that it ruled. That plaintiff may have subsequently used the evidence in ways that did not comply with the court's limitations on its admissibility has no bearing on whether the court erred in its original ruling. If plaintiff attempted to use the evidence for a purpose that went beyond the scope of the court's ruling, defendant could have moved that the court reconsider its decision, requested a limiting instruction, or objected to the purposes for which plaintiff sought to use the evidence. It did not do so, with one exception that we now discuss.

Defendant's product engineering manager testified that the fishbowl could not have shattered in the way that plaintiff described and that there must have been contact between the fishbowl and something else. On cross-examination, plaintiff asked:

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"Q. What about the other people that filed complaints, and they said they had, they hadn't bumped it? You heard Ms. Gifford testify by deposition and Mrs. Bocala testify that it had never been bumped and banged to their knowledge, and it just exploded. You heard that testimony, did you not, sir?

"A. Yes, along with the testimony of uneven glass.

"Q. You heard that testimony that it just exploded?

"A. Yes.

"[Defendant's attorney]: Your Honor, this evidence I thought was for — I'd object on relevance in terms it's the earlier complaints that were noticed.

"THE COURT: I didn't hear your last —

"[Defendant's attorney]: The earlier complaints were for notice, as I understood your ruling, were for notice.

"THE COURT: All right. The answer will stand.

"Next question, please.

"Q. (By [plaintiff's attorney]): Don't you think that information, if it was in the possession of Anchor

> Hocking, would have been adequate notice for Anchor Hocking to have to evaluate what had been occurring in these bowls? That that would be important information for them to know?"

Because plaintiff's question after the court's ruling refocused on the issue of notice, there is no basis for us to conclude that the trial court's ruling during trial caused any prejudice to defendant even if the use of the evidence before the objection exceeded the scope of the earlier ruling.

We conclude that the trial court did not err in ruling that the evidence of the prior instances of defendant's fishbowls shattering was substantially similar[2] to plaintiff's circumstances to make the evidence relevant for the limited purpose of demonstrating that defendant had notice of that propensity under ordinary use, notice that could require a prudent manufacturer to issue a warning to the consumers about the

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2. In its petition for reconsideration before the Supreme Court, defendant argued that we ignored the rule of *Conachan v. Williams*, 266 Or. 45, 60-61, 511 P.2d 392 (1973), that the court must undertake a "gate keeping" function by determining whether there is evidence of "substantial similarity" between the prior complaints and plaintiff's circumstances before permitting the introduction of the evidence of the prior complaints for any purpose, including notice to defendant of a problem that should have prompted a warning to consumers. In fact, we implicitly applied such a test and answered defendant's argument without an express reference to *Conachan*. After describing the evidence from the prior occurrences, we said that there was evidence in the pre-trial hearing from which a trier of fact could find that "plaintiff sustained physical injuries under almost identical circumstances to those circumstances that caused injuries to other complainants." 149 Or.App. at 469, 944 P.2d 957.

use of its product. OEC 401; OEC 402. *See also Oberg v. Honda Motor Company*, 316 Or. 263, 268-69, 851 P.2d 1084 (1993), *rev'd on other grounds sub nom Honda Motor Co. v. Oberg*, 512 U.S. 415, 114 S.Ct. 2331, 129 L.Ed.2d 336 (1994) (holding that evidence of reported problems with the defendant's product overturning backwards was admissible to prove that the defendant had notice of a dangerous defect in its product). We also conclude that the trial court did not abuse its discretion under OEC 403 at the pretrial hearing when it determined that the probative value of the evidence was not substantially outweighed by any unfair prejudice arising from the admission of the evidence. "Relevant evidence often has the effect of proving one party's position while harming the other's." *McCathern v. Toyota Motor Corporation*, 332 Or. 59, 71, 23 P.3d 320 (2001). Here, the potential prejudice that the evidence could also be viewed as proving that defendant manufactured fishbowls with a defective design (a theory not advanced by plaintiff) does not prevent the admissibility of the evidence for the limited purpose of demonstrating that defendant's notice of a problem that occurred during the ordinary use of its product should have prompted a warning on its part.

Defendant next asserts that the trial court's instruction on its duty to warn of a potential hazard was incorrect. According to defendant, the instruction misstated Oregon law because it in effect told the jury that defendant is liable for a failure to warn regardless of whether it knew or should have known that its fishbowls had a propensity to shatter with ordinary use. Defendant concedes that it failed to except to the instruction. ORCP 59 H provides:

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> "No statement of issues submitted to the jury pursuant to subsection C(2) of this rule and no instruction given to a jury shall be subject to review upon appeal unless its error, if any, was pointed out to the judge who gave it and unless a notation of an exception is made immediately after the court instructs the jury. Any point of exception shall be particularly stated and taken down by the reporter or delivered in writing to the judge. It shall be unnecessary to note an exception in court to any other ruling made. All adverse rulings, including failure to give a requested instruction or a requested statement of issues, except those contained in instructions and statements of issues given, shall import an exception in favor of the party against whom the ruling was made."

Nonetheless, defendant argues that the trial court's instruction was error on the face of the record. Accordingly, it asks us to review its assignment despite its failure to voice an exception to the instruction.

The substantive issue presented by defendant's argument is whether a statement in *Phillips v. Kimwood Machine Co.*, 269 Or. 485, 525 P.2d 1033 (1974), that the "knew or should have known" standard does not apply to strict liability failure to warn claims has been legislatively superseded by the subsequent enactment of ORS 30.920(3). That is the kind of issue that cannot be the subject of an unpreserved claim of error under the criteria that the Supreme Court described in *Ailes v. Portland Meadows, Inc.*, 312 Or. 376, 823 P.2d 956 (1991). One of those criteria is that the error must be obvious

and not reasonably in dispute. *Id.* at 381-82, 823 P.2d 956. Defendant's claim of error under this assignment does not satisfy that characterization.

Finally, we consider whether the evidence permitted the jury to award punitive damages and, if so, whether the evidence supports the amount that the jury awarded.[3] ORS 30.925 is the beginning point for determining the criteria for awarding punitive damages in a products liability case. The relevant portions of the 1979 version of the statute, which applies to plaintiff's claim,[4] provide:

> "(1) In a product liability civil action, punitive damages shall not be recoverable unless it is proven by clear and convincing evidence that the party against whom punitive damages is [*sic*] sought has shown wanton disregard for the health, safety and welfare of others.
>
> " * * * * * *
>
> "(3) Punitive damages, if any, shall be determined and awarded based upon the following criteria:

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3. Defendant does not assert that the court's instructions on punitive damages were incorrect.

4. The legislature amended ORS 30.925 in 1995. Or. Laws 1995, ch. 688, § 4. The amendments apply only to cases filed on or after September 9, 1995, the effective date of the changes. Or. Laws 1995, ch. 688, § 5. Plaintiff filed this case in 1994.

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"(a) The likelihood at the time that serious harm would arise from the defendant's misconduct;

"(b) The degree of the defendant's awareness of that likelihood;

"(c) The profitability of the defendant's misconduct;

"(d) The duration of the misconduct and any concealment of it;

"(e) The attitude and conduct of the defendant upon discovery of the misconduct;

"(f) The financial condition of the defendant; and

"(g) The total deterrent effect of other punishment imposed upon the defendant as a result of the misconduct, including, but not limited to, punitive damage awards to persons in situations similar to the claimant's and the severity of criminal penalties to which the defendant has been or may be subjected."

Appendix A

We have discussed the requirements for punitive damages in two recent "failure to warn" cases.[5] In *Lakin v. Senco Products, Inc.*, 144 Or.App. 52, 925 P.2d 107 (1996), *aff'd* 329 Or. 62, 987 P.2d 463, *on recons.* 329 Or. 369, 987 P.2d 476 (1999), the evidence permitted the jury to find the following facts. The plaintiff was seriously injured when a nail gun that the defendant manufactured double-fired in a way that led to a third firing that sent a nail into the plaintiff's brain. The defendant was aware of the nail gun's tendency to double fire, but it conducted no tests to determine how frequently it did so or what injuries might result from a double firing. If it had conducted those tests, the defendant would have known of the gun's potential for injury and could have easily changed both the gun's design and the accompanying warnings. The jury could have believed that the defendant's decisions not to conduct tests or to issue better warnings were

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5. Defendant has moved for leave to file a memorandum on remand concerning the appropriateness and amount of the award of punitive damages. We deny the motion. We discuss all but one of the cases that defendant mentions in the course of analyzing the issues. The remaining case, *Cooper Industries, Inc. v. Leatherman Tool*, 532 U.S. 424, 121 S.Ct. 1678, 149 L.Ed.2d 674 (2001), concerns the standard of appellate review of a trial court's action on a motion to reduce an award of punitive damages as excessive. Assuming that the Court was stating a requirement of due process rather than exercising its supervisory authority, we understand *Leatherman* to require us to review the amount of a punitive damages award as a matter of law, without deferring to the trial court's judgment. That, at least, appears to be what the Court means by "*de novo*" review of legal questions, a concept that Oregon courts do not use. *See Trabosh v. Washington County*, 140 Or.App. 159, 163 n. 6, 915 P.2d 1011 (1996). In any case, we have reviewed the relevant issues consistently with the court's holding in *Leatherman*.

motivated, at least in part, by its desire to sell additional nails, which were a major source of its profits from the gun. We concluded that, if the jury found those facts to be true, they could provide clear and convincing evidence that the defendant's conduct satisfied the requirements of ORS 30.925.[6] *Lakin*, 144 Or.App. at 71-74, 925 P.2d 107.

In *Axen v. American Home Products Corp.*, 158 Or.App. 292, 974 P.2d 224, *on recons.* 160 Or.App. 19, 981 P.2d 340, *rev. den.* 329 Or. 357, 994 P.2d 124 (1999), *cert. den.* 528 U.S. 1136, 120 S.Ct. 979, 145 L.Ed.2d 930 (2000), the defendant warned that optic neuritis was a rare side effect of using a drug that it manufactured, but it did not warn that optic neuropathy resulting in vision loss was also a side effect. There was evidence that the defendant knew of the danger and effect of optic neuropathy and made a conscious decision not to warn about that side effect, at least in part because of the possible effect of a warning on the defendant's ability to market the drug. Thus, there was evidence from which the jury could conclude, by clear and convincing evidence, that the defendant acted with a disregard of or an indifference to a known risk to consumers out of a motive for profit. 158 Or.App. at 311-13, 974 P.2d 224.

Defendant relies heavily on *Andor v. United Air Lines*, 303 Or. 505, 511-13, 739 P.2d 18 (1987), in which the Supreme Court discussed punitive damages in a negligence case. In *Andor*, the court explained that the issues for a trial court to consider in determining whether punitive damages

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6. On review, the Supreme Court agreed with our conclusions in that regard. *Lakin*, 329 Or. at 82-84, 987 P.2d 463.

might be appropriate in a particular case are similar to, although balanced differently from, the issues in a claim for intentional infliction of emotional distress. It summarized those issues by stating that "[p]unitive damages * * * are a penalty for conduct that is culpable by reason of motive, intent, or extraordinary disregard of or indifference to known or highly probable risks to others." 303 Or. at 517, 739 P.2d 18. *Andor* involved an airplane crash that was the result of the combination of a repair to a landing gear that led the crew to be uncertain whether the gear had properly extended and the pilot's unwillingness to accept assurances that the landing gear was safe. In holding that punitive damages were not appropriate, the court stated that the evidence showed only that the company and the pilot had each acted negligently. The accident was the result of a negligent repair combined with a reaction by the pilot that the jury could find to be foreseeable. That evidence was sufficient to subject the company to liability for compensatory damages, but it was insufficient to support an award of punitive damages. The Supreme Court explained,

> "[M]ere failure to foresee the pilot's reactions is not enough for punitive damages. If this sufficed, it would support a claim for punitive damages whenever some persons within an organization failed to anticipate foreseeable risks of substandard performance by others in the organization. For punitive damages, some *conscious disregard* of or *highly irresponsible indifference* to this human element in the decision on equipment is required." *Andor*, 303 Or. at 517, 739 P.2d 18 (emphasis added).

Defendant argues here that, as in *Andor*, the most that plaintiff has shown is that it acted negligently in several ways and that one kind of negligence, added to another kind of negligence, does not provide a basis for punitive damages. However, defendant ignores some crucial aspects of the evidence. According to defendant's product engineering manager, he had not known before this lawsuit of any previous injuries from defendant's fishbowls, nor did he know whether defendant had ever studied whether chips or dings might lead to an unexpected shattering from the weight and force that water would exert on a fishbowl during its ordinary use. Moreover, defendant had no consistent policy concerning retention of documents or complaints filed against it for fishbowls that injured people. Although defendant's representative agreed that the corporation had the responsibility to build into its data collection system a way to know what was happening to its products once they were put into the hands of consumers, he admitted that the company continued to destroy documents that were more than five years old. The manager was also unaware of any market research to determine whether customers appreciated the latent hazards that might accompany the normal use of a fishbowl.

Based on that evidence, the jury could have found that the evidence was clear and convincing that defendant was aware of the risk to consumers created by its product, consciously chose to ignore that information, and continued to market its product without a warning. The jury could also have found that the preparation and the distribution of a warning to accompany the fishbowls would have imposed only insignificant costs on defendant. In our view, that conscious

indifference to the possibility that the fishbowl could injure someone during ordinary use and the failure to warn of that possibility cause this case to fall within the criteria of ORS 30.925(3). Such evidence implies a wilful disregard of a known risk to consumer safety, distinguishes this case from the ordinary negligence in *Andor*, and makes it more like the profit-motivated, conscious disregard of risks that existed in *Lakin* and *Axen*. We conclude that the evidence was sufficient to permit the jury to award punitive damages under the statute.

Defendant next argues that the amount of punitive damages that the jury awarded was grossly excessive under the Fourteenth Amendment.[7] In *Parrott v. Carr Chevrolet, Inc.*, 331 Or. 537, 17 P.3d 473 (2001) the Supreme Court evaluated the standards for post-judgment review of punitive damage awards in light of *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996), and *Honda Motor Co. v. Oberg*, 512 U.S. 415, 114 S.Ct. 2331, 129 L.Ed.2d 336 (1994). It summarized its conclusions:

"A jury's punitive damages award is not 'grossly excessive' — and, therefore, will not be disturbed on review — if it is within the range that a rational juror would be entitled to award in light of the record as a whole. * * * [T]he range that a rational juror would be entitled to award depends on the following: (1) the statutory and common-law factors that allow an award of punitive damages for the specific kind of claim at issue * * *; (2) the state interests that a punitive

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7. Defendant followed the appropriate post-trial procedures for raising this issue.

damages award is designed to serve * * *; (3) the degree of reprehensibility of the defendant's conduct * * *; (4) the disparity between the punitive damages award and the actual or potential harm inflicted * * *; and (5) the civil and criminal sanctions provided for comparable misconduct[.]" *Parrott*, 331 Or. at 555, 17 P.3d 473.

We have already discussed most of the statutory factors that permit an award of punitive damages. As to the other statutory factors, there is no evidence of any other punishment imposed on defendant for these actions, and the amount of the award is approximately one month of defendant's net profit.

We turn to the remaining factors that *Parrott* describes. The primary state interest involved is preventing injury to Oregonians from defective products. Punishing manufacturers who fail to investigate the safety of their products after learning of injuries that these products caused furthers that interest, and ORS 30.925 puts manufacturers on notice that such punishment is a possibility. In addition, there is no evidence that defendant received any other civil or criminal punishment for this conduct. The final factor is the relationship between the punitive damages award and the actual damages that plaintiff suffered. Plaintiff's injuries were serious, and her damages were substantial. Even after reducing the jury's award of compensatory damages to reflect plaintiff's 25 percent share of the fault, the judgment in her favor for those damages exceeds $100,000. It is common knowledge that broken glass is dangerous and can cause serious injuries. We cannot say that it is excessively disproportionate to punish a company that makes glass products that can cause the degree of damage that plaintiff suffered by an award that is no more than ten times the actual injury that its actions

caused.[8] That is particularly the case when a defendant, as the defendant here, consciously ignores indications that its product is unsafe. We conclude that the $1 million punitive damage award is within the range that a reasonable juror could award under the criteria that the court identified in *Parrott.*

Defendant's final argument is that the court should have reduced the award of punitive damages to reflect plaintiff's share of the fault for her injuries. It argues that ORS 18.470(1) requires that result because the statute refers to "any damages."[9] Defendant confuses apples with oranges. The purpose of ORS 18.470 is to replace contributory negligence as an absolute defense to a negligence action with comparative fault. The effect of the statute is that the defendant is not required to pay the plaintiff for that portion of the plaintiff's actual damages that are the result of the plaintiff's own fault. The words "any

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8. In *Parrott*, where the defendant's actions were more reprehensible but the only injury was economic, the Supreme Court approved a punitive damages award that was 87 times the compensatory damages. By making these comparisons, we do not mean to suggest that any particular ratio between compensatory and punitive damages is or is not excessive.

9. ORS 18.470(1) provides:

"Contributory negligence shall not bar recovery in an action by any person or the legal representative of the person to recover damages for death or injury to person or property if the fault attributable to the claimant was not greater than the combined fault of all persons specified in subsection (2) of this section, but any damages allowed shall be diminished in the proportion to the percentage of fault attributable to the claimant. This section is not intended to create or abolish any defense."

damages" in the statute have nothing to do with punitive damages, which are not intended to compensate a plaintiff for his or her injuries. Rather,

> "[t]he legal doctrine of punitive damages is founded on the theory that certain intentional acts should be punished or deterred. Punishment and deterrence concern behavior that society finds undesirable. Punishment and deterrence are not related to actual or compensatory damages. Punitive damages are not to compensate an injured party, but to give bad actors a legal spanking." *Lane County v. Wood*, 298 Or. 191, 203, 691 P.2d 473 (1984).

That the jury found that plaintiff was partly responsible for the events that led to her injuries has nothing to do with the reprehensibility of defendant's conduct or the appropriate punishment for it. Plaintiff did not contribute to the conduct that justifies giving defendant a legal spanking; thus, there is no reason that the fact that she did contribute to the conduct that caused her injuries should affect the severity of that spanking.[10]

Affirmed.

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10. Defendant also relies on *Seiders v. Hefner*, 89 Or.App. 55, 747 P.2d 1003 (1987), *rev. den.* 305 Or. 576, 753 P.2d 1382 (1988), in support of its argument. It points to that case as an example of where we affirmed a punitive damage award that had been reduced by the amount of the plaintiff's comparative fault. However, the issue raised here by defendant was not raised in *Seiders*.

APPENDIX B — DECISION BY THE CIRCUIT COURT OF MULTNOMAH COUNTY, OREGON DATED SEPTEMBER 22, 1995

Fax Communication
from
Judge Robert P. Jones
Circuit Court, Multnomah County
1021 SW 4th Avenue
Portland, Oregon 97204

Telephone (503)-248-3038 **FAX (503)-248-3028**

September 22, 1995

To: Attorneys: Stephen Walters, Michael Gentry, Kathryn Clarke and Lawrence Wobbrock

Subject: Waddill v. Anchor Hocking — A9405-03390

Decision on defendant's post-trial motions.

1. To set aside punitive damage award — denied.
2. To remit the amount of the punitive damage award — denied.
3. To set-off the comparative negligence percentage on the punitive damages — denied.

Plaintiff will prepare an order in conformity with this ruling.

APPENDIX C — DECISION BY THE CIRCUIT COURT OF MULTNOMAH COUNTY, OREGON DATED NOVEMBER 14, 1995

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF MULTNOMAH

No. 9405-03390

ARLEEN R. WADDILL

Plaintiff,

-vs-

ANCHOR HOCKING INC. a Delaware Corporation,

Defendant.

ORDER RE: DEFENDANT'S
POST-TRIAL MOTION
TO DISMISS OR FOR NEW TRIAL

Defendant's Post Trial Motion to Dismiss or For New Trial having been argued before The Honorable Robert P. Jones on the 7th day of November, 1995, with plaintiff, appearing by and through her attorneys, Lawrence Wobbrock and Kathryn H. Clarke, and defendant, appearing by and through its attorneys, Stephen Walters, Robert H. Riley, and Catherine Masters Epstein. The court having read the parties' submissions, and heard argument by counsel, now Orders that:

Appendix C

Defendant's Post Trial Motion to Dismiss or For New Trial are denied in their entirety.

DATED: this 14th day of November, 1995

/s/ ROBERT P. JONES
ROBERT P. JONES
Circuit Court Judge

Submitted by:
Lawrence Wobbrock, OSB #77391
1020 S.W. Taylor, Suite 800
Portland, OR 97205
(503) 228-6600
Of Attorneys for Plaintiff

APPENDIX D — DENIAL OF PETITION FOR REVIEW BY THE OREGON SUPREME COURT DATED JUNE 4, 2002

IN THE SUPREME COURT OF THE STATE OF OREGON

CA A91012
SC S48940

ARLEEN R. WADDILL

Respondent/Respondent

v.

ANCHOR HOCKING INC.

Appellant/Petitioner

ORDER DENYING REVIEW

The Court has considered the petition for review and orders that it be denied.

DATE: June 4, 2002.

/s/ WALLACE P. CARSON, JR.
WALLACE P. CARSON, JR.
CHIEF JUSTICE